

Adverse consequences

Stephen Hockman QC condemns government manoeuvres to restrict affordable access to environmental justice



The importance of an appropriate legal framework for the protection of the environment should, in this day and age, need no emphasis. There are two aspects of this framework. The first is the system of public law under which decisions by public authorities that, unlawfully or irrationally, fail to protect our environment can be challenged by way of judicial review. The ability to bring such judicial review challenges has been held by the Judicial Committee of the House of Lords (the predecessor of the Supreme Court) as essential to secure compliance with our obligations under the European Convention of Human Rights. The UK is also a party to the so-called AARHUS Convention, which requires that such challenges can be brought without prohibitive expense, a duty which, according to a recent decision of the AARHUS compliance committee, the UK is already failing to meet.

Of equal importance is the ability of a citizen or a group of citizens to bring private law proceedings (usually based on the tort of environmental nuisance) for compensation and sometimes for an order prohibiting a defendant (such as a poorly-run industrial concern) from

continuing to cause the environmental nuisance complained of.

Obstacles to justice

The single greatest obstacle to access to justice in these cases lies in our traditional costs rule whereby “costs follow the event”. In other words, if you lose the case, then you will have to pay your opponent’s costs in addition to the costs which you have yourself incurred in pursuing it. Such costs, particularly in complex cases, can be very substantial indeed, often sufficient to deter all but the most wealthy from bringing litigation in any of the above categories.

There is a widespread view that, even under our present arrangements, and without the impact of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Bill, there are serious obstacles to access to justice in this kind of case. Two and only two forms of protection exist in relation to adverse costs.

Costs protection

The first is the possibility of seeking a protective costs order (PCO) at the outset of a case, and there is a current consultation on the arrangements for

this. However, this form of protection does not apply to private law cases, and even in public law cases the claimant would have an exposure to costs of uncertain amount up to £5,000, or more if publicly available information showed that his means justified a greater exposure.

The second form of protection, which is effectively limited to claims for monetary compensation, is in the context of a conditional fee agreement (CFA). In cases in which a claimant’s lawyers act under such an agreement, it has been the practice to arrange insurance (known as after the event (ATE) insurance) to meet the adverse costs if the claim does not succeed. By statute, the ATE insurance premium (which can be very high) can be ordered to be paid by the unsuccessful defendant.

It follows from the above that even today, litigants in environmental cases will potentially be denied access to justice unless the case is one in which there is ATE insurance or where a PCO is available.

Increased risks

A major problem with the LASPO Bill is that it will abolish the right to recover

the ATE premium. At a stroke, this will hugely increase the risks of going to law, even in those private law cases in which such risks could previously be covered by insurance as already explained.

Apart from protecting the litigant against the risk of adverse costs, it also used to be thought desirable to ensure that those litigants who could not afford the costs of their own representation (again in complex cases a significant figure) could achieve representation, and at least in private law cases the CFA would secure this. The essence of this scheme is that in order to finance his caseload, the claimant's lawyer is permitted to charge, and to recover from the defendant, a success fee if indeed the case succeeds, limited to up to 100% of the costs. (It does not equate to a percentage of any compensation recovered.)

The LASPO Bill, however, proposes the abolition of the right to recover success fees and ATE premiums—certainly a radical step. This in itself is in accordance with a recent report by Lord Justice Jackson which has received much acclaim. However, and critically,

Jackson LJ's report contained a number of pre-conditions without which, in his view, the proposed abolition of the right to recover success fees and ATE premium would be entirely unacceptable.

“ Many claimants in environmental cases will be left totally exposed to the risks of significant adverse costs ”

Pre-conditions

The first of those pre-conditions was that legal aid in civil cases (already greatly restricted) should not be subject to any further restrictions. Unfortunately the LASPO Bill instead involves many further restrictions on the scope and extent of civil legal aid. The second, and perhaps equally important, pre-condition laid down by Jackson LJ was that, subject to certain qualifications, the rule that costs always follow the event should also be abolished. In other words, the risk of adverse costs would no longer arise. This vital protection appears nowhere in the LASPO Bill.

It is said that it will be progressed by other means, but even then only in personal injury cases. This would leave claimants in most environmental cases totally exposed to the risk of significant

adverse costs, as well as with no means to pay their own costs, with their right to access to justice correspondingly undermined.

Space does not permit a full analysis of the problems, let alone a description of possible solutions which are likely to be canvassed in amendments put down for the Committee stage in the House of Lords, but it is to be hoped that access to justice in these cases will eventually be enhanced rather than yet further diminished and undermined.

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Stephen Hockman QC, 6 Pump Court.
Website: www.6pumpcourt.co.uk

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